No. 93-239

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

BRIAN M. BARTLEY,

Petitioner,

v.

RICHARD A. HANDELSMAN &
HANDELSMAN VENTURE GROUP,

Respondents.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT

OF APPEALS FOR THE 6TH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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EDITOR'S NOTE

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QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals err in granting Summary Judgment as to Count I?

II. Did the Court of Appeals err in granting Summary Judgment as to Count II?

III. Did the Court of Appeals err in ruling that no genuine issue of material fact exists?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the 6th Circuit.

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PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT

OF APPEALS FOR THE 6TH CIRCUIT

BRIAN M. BARTLEY, the petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the 6th Circuit, entered in the above-entitled case on May 27, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals herein sought to be reviewed is reprinted in the Appendix to this Petition at Page 1. That opinion was filed April 19, 1993 and was "issued as mandate" on May 27, 1993.

Petitioner filed a timely Petition for Rehearing pursuant to FRAP 40 on April 29, 1993.

By order filed May 19, 1993 that Petition was denied. A copy of the Order denying Plaintiff's Petition for Rehearing is reprinted in the Appendix to this Petition at Page 17.

The prior Order of the United States District Court for the Eastern District of Michigan, Southern Division, entered September 5, 1991 is reprinted in the Appendix to this Petition at Page 18.

On September 10, 1991, Plaintiff petitioned for reconsideration of that Order. By Order of October 2, 1991, the District Court denied that Motion for Reconsideration. A copy of that Order appears at Page 20 of the Appendix to

this Petition.

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals was entered on May 27, 1993. The jurisdiction of this Court is invoked pursuant to 28 USC §1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

U.S. Constitution, 14th Amend., Sec. 1

28 USC 1332 (a)(1)

28 USC 1254 (1)

SCR 10

FRCP 56 (a) and (c)

FRAP 40

See Appendix pages 22 through 29 for verbatim provisions of the foregoing.

STATEMENT OF THE CASE

Plaintiff's sworn Complaint was originally filed in the Circuit Court for the County of Washtenaw, State of Michigan. Defendants removed the case to the United States District Court for the Eastern District of Michigan because of the diversity of citizenship of the parties, the amount in controversy being in excess of $50,000. [28 USC 1332 (a)(1)]

His sworn Complaint alleges that in June of 1988 Plaintiff, one MICHAEL H. OESTERLE (OESTERLE) and Defendant RICHARD A. HANDELSMAN (HANDELSMAN) embarked upon a joint venture now known as HANDELSMAN VENTURE GROUP (HVG). That joint venture was formed for the purpose of identifying, evaluating, acquiring, structuring, promoting, selling and managing various oil and gas drilling programs for the financial benefit of the venture.

Plaintiff's responsibilities as a member of that venture were to research, evaluate, identify and introduce to the venture, oil and

as drilling prospects. HANDELSMAN was to rovide the necessary capital to acquire and romote those drilling prospects.

As compensation for his participation in nd contributions to the joint venture, laintiff was to receive a 10% "carried" nterest in and to all oil and gas drilling rospects introduced by him and acquired by HVG, $2,000 per month draw, and reimbursement for xpenses incurred. (R.33: BARTLEY Dep. of /29/90 pp. 51-55, 115, 129-131 and Exhibit 1 hereto, p. 13; R.34: OESTERLE Dep. pp. 35-55) All citations herein are to the record before he 6th Circuit Court of Appeals.) Defendants haracterize the $2,000 monthly payments eceived by Plaintiff as "salary" for services endered. Neither Plaintiff nor witness ESTERLE characterized those payments as such. hey described the payments as an agreed upon draw", an advance against profits for dditional unanticipated and uncompensated work one by Plaintiff after his introduction of both

the Trendwell and Ward Lake Prospects to the venture. (R. 33: BARTLEY Dep. of 8/29/90 pp. 130-132; R. 34: OESTERLE Dep. p. 116) The record clearly reflects that no such "draw" payments were involved in the parties relationship until September of 1988. At that time, having cleared the matter with Defendant HANDELSMAN, OESTERLE suggested that since Plaintiff's services had far exceeded those originally anticipated as his contribution to the venture, he should be paid compensation over and above that discussed at the formative meeting. In recognition of his exceptional contributions to the venture, the Plaintiff was paid the sum of $2,000 per month as a "draw", retroactive to June of 1988, commencing in September of 1988. (R. 33; R. 34: OESTERLE Dep. pp. 114-124)

During the period between April of 1988 and June of 1989 Plaintiff identified, researched, evaluated and introduced to HVG a substantial number of oil and gas drilling prospects,

expending considerable time, effort and money in so doing. (R.42: BARTLEY Dep. of 8/29/90 p. 33-35, 132-133) With his assistance, Defendants acquired, structured, promoted, sold, developed and produced those prospects. (R.34: OESTERLE Dep. pp. 71-75)

Through Plaintiff's efforts, Defendants have acquired from Ward Lake Drilling, Inc., under and pursuant to a "Master Agreement" dated February 1, 1989 (R.78: Exhibit 1 to HANDELSMAN Dep. of 1/23/91) the following interests in the following oil and gas drilling prospects:

A. 50% of the Charlton 9 Prospect (R.78: Exhibit 2 to Handelsman Dep of 1/23/91);

B 75% of the Chester 18, Stage I Prospect (R.78: Exhibit 3 to Handelsman Dep of 1/23/91);

C. 75% of the Chester 18, Phase II Prospect (R.78: Exhibit 8 to Handelsman Dep of 1/23/91);

D. 50% of the Charlton 30-31 Prospect (R.78: Exhibit 4 to Handelsman Dep of 1/23/91);

E. 25% of the Hayes 12 Prospect (R.78: Exhibit 7 to Handelsman Dep of 1/28/91);

F. 50% of the Charlton 2 Prospect (R.78: Exhibit 6 to Handelsman Dep of 1/23/91);

G. 50% of the Charlton 5-8 Prospect (R.78: Exhibit 5 to Handelsman Dep of 1/23/91);

H. 25% of the Chester 22 Prospect;

I. 25% of the Chester 27 Prospect;

J. 25% of the Charlton 11, Phase II Prospect; and

K. 40% of the Charlton 35 Prospect;

HANDELSMAN was at the time of his introduction to Plaintiff a neophyte in the business of exploration for and production of Antrim gas reserves in Michigan. His only foray into that area had been a resounding failure. (R. 34: OESTERLE Dep. pp. 38-45) HANDELSMAN of course blamed one of his advisors for that failure. His relationship with that advisor terminated, almost comically, in a fisticuffs. (R. 76, 77: BARTLEY Dep. of 1/22/91 p. 84) At

HANDELSMAN's request, OESTERLE thereafter enlisted Plaintiff's aid to attempt to salvage the substantial investment of time and money in that first crusade. (R. 34: OESTERLE Dep. pp. 38-45) BARTLEY's capabilities in that regard are conclusively demonstrated by the results of his endeavors.

Although HANDELSMAN doesn't remember it, Defendants have conveyed all of their right, title and interest in and to said prospects to third parties, without the knowledge or consent of Plaintiff herein. (R.78: HANDELSMAN Dep. of 1/23/91, p. 112 and Exhibits 16, 17, 18 & 19 thereto.) Some of those conveyances were made as recently as March of 1991. (R.102 and 103: ASHTON Dep. pp. 74-75 and Exhibits 14, 15 and 16 thereto)

Some monies were paid by HVG to Plaintiff covering his $2,000 monthly draw and his expenses. (R.33: BARTLEY Dep. of 8/29/90 pp. 129-131) Defendants have, however, refused to transfer to Plaintiff the 10% carried interest

agreed upon. (Plaintiff's Complaint Paragrap
13)

Of the three venturers engaged in HVG, tw
of them, Plaintiff and OESTERLE, specificall
recall their agreement of association a
hereinabove described. (R.33: BARTLEY Dep. o
8/29/90 p. 115, and 129-131 and Exhibit
thereto, p. 13; and R.34: OESTERLE Dep. pp. 45
55) HANDELSMAN, who has obtained title to al
of the prospects in question, says that he ha
no recollection of the discussions an
agreements resulting in formation of th
venture. (R.27: HANDELSMAN Dep. of 7/6/90 p
32, 42-49, 52-54, and 92)

OESTERLE, whose character Defendants no
disparage, was HANDELSMAN's joint ventur
partner, serving as Managing Director of HVG
He virtually ran that enterprise with BARTLEY'
assistance. As appears from the written Joi
Venture Agreement pertaining thereto, HANDELSM
agreed to pay OESTERLE $120,000 per year f
those services. (R. 34: OESTERLE Dep

xhibit 1)

At the taking of his deposition early in hese proceedings, HANDELSMAN produced a copy of fully executed joint venture agreement and estified unequivocally that the "HANDELSMAN ENTURE GROUP" referred to therein, is defunct, ever acquired any assets, and never conducted ny business. (R.27: HANDELSMAN Dep. of 7/6/90, p. 10-17) HANDELSMAN unequivocally denies that ny other "HANDELSMAN VENTURE GROUP" ever came nto existence. (R.27: HANDELSMAN Dep. of /6/90, pp. 19-22) His testimony is belied by he fact that "HANDELSMAN VENTURE GROUP" in hich he is a "Partner" acquired substantial articipatory interests in oil and gas projects rom Trendwell Oil Corporation by document dated uly 6, 1988 (R.75: Exhibit 2 to MALL Dep.) and rom Ward Lake Energy, Inc., via "Master greement" dated February 1, 1989 (R.78: xhibit 1 to HANDELSMAN Dep. of 1/23/91). ARTLEY aided substantially in negotiation of he "Master Agreement". (R.92: DUDLEY Dep. pp.

59-60; R.33: BARTLEY Dep. of 8/29/90, Exhibits 5, 6, 7 & 11) It was executed on behalf of HVG by OESTERLE as its "Managing Director". HVG also has and uses company checking accounts and letterhead. (R.78: Exhibit 8 to HANDELSMAN Dep. of 1/23/91; R.34: Exhibits 4 and 10 to OESTERLE Dep.)

The documents by which the venture acquired its interest in the Trendwell Project were executed by Mr. BARTLEY as "Agent" for HVG. HVG acquired title to that property and HANDELSMAN executed a Division Order covering that interest as a "Partner" of HVG on June 12, 1989. (R.75: Exhibit 21 to MALL Dep.) With respect to this project, BARTLEY acquired a 10% interest which HVG paid for, making the same a "carried" interest. (R.75: MALL Dep. pp. 18-19, 27-30, 35; R.33: BARTLEY Dep. of 8/29/90 p. 90) BARTLEY was paid nothing for his efforts by Trendwell, and did not act as a "finder" for that company. (R.75: MALL Dep. p. 70-71; R.33: BARTLEY Dep. of 8/29/90 pp. 121-122)

In conversations with Plaintiff, HANDELSMAN as admitted the existence of the joint venture s alleged by BARTLEY. (R.33: BARTLEY Dep. of /29/90 pp. 17-21) At least one of those dmissions is preserved on a tape recording of ANDELSMAN. (R.33: BARTLEY Dep. of 8/29/90, xhibit 4) HANDELSMAN made similar admissions o witness Wolfson. (R.82: WOLFSON Dep. pp. 26-7)

HANDELSMAN, OESTERLE and BARTLEY, made it lear to those with whom they conducted the usiness of HVG that the they were principals in onjunction with that business. (R.80: LINDA ARTLEY Dep.; R.92: DUDLEY Dep. p. 48; R.82: OLFSON Dep. pp. 26-27; R.75: MALL Dep. pp. 50-2, 55-58; R.94: GEORGI Dep. pp. 11, 13, 15; .85: KOSTRZEWA Dep. pp. 8-9)

The relationship of the parties and their espective participatory interests in HVG were ummarized in writing, by HANDELSMAN in late 989, showing Plaintiff to have a 10% carried nterest therein. (R.102, 103: ASHTON Dep. pp.

49-59 and Exhibit 6 thereto)

Given the foregoing factual circumstances, witness KOSTRZEWA has concluded that, based upon industry practices and standards, the parties arrived at an agreement whereby Plaintiff is entitled to a 10% carried interest in the Ward Lake Project or the cash equivalent thereof. (R.85: KOSTRZEWA Dep. pp. 15-31)

REASONS FOR GRANTING THE WRIT

The Judgment of the United States Court of Appeals for the 6th Circuit should be reviewed by this Court because, as hereinafter discussed, it has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

Furthermore, its decision concerning application of the law of Summary Judgment herein conflicts with applicable decisions of this Court and other United States Courts of Appeals. (SCR 10) Both the District Court and

he 6th Circuit Court of Appeals went to extreme nd unjustified lengths to dismiss Petitioner's omplaint without a trial.

The Court of Appeals Erred in Granting Summary Judgment on an Alternative Basis

After agreeing with BARTLEY and ruling that he District Court erred in holding that he ould not be a joint venturer under Michigan aw, the Court of Appeals went on to affirm the istrict Court's grant of Summary Judgment on ther grounds under the authority of Hansard v. arrett, 980 F 2d, 1059, 1061 (6th Circuit, 992).

In so ruling, the Court of Appeals found nat BARTLEY had failed to adequately define or xplain the interest he claims in this suit, nough he had an adequate opportunity to do so. ne Court erred on both points. As set forth in ARTLEY's Appellate Briefs, the issue on appeal o the Court of Appeals was a narrow one. either of the parties briefed or argued, nor id the Court of Appeals inquire on Oral rgument or at any other stage, into the

sufficiency of BARTLEY's definition of the interest that he claims.

Because BARTLEY did not have a realistic opportunity to respond to the "new theory" upon which the Court of Appeals seized in making its ruling, it had no authority to grant Summary Judgment under the Hansard case.

BARTLEY has Not Failed to Adequately Define or Explain the Interest He Claims in this Suit

The Court of Appeals recognized that in his Verified Complaint BARTLEY claimed that he and Handelsman agreed that he would be compensated, in part, by a 10% "carried interest" in and to all oil and gas drilling prospects introduced by him and acquired by HVG. In Count I of that Complaint, which is founded upon "Breach of Contract and Joint Venture Fiduciary Duties", Plaintiff prayed for Judgment against Defendants for 10% of the "gross proceeds of production" from all oil and gas drilling prospects introduced by Plaintiff to the Venture. In Count II of that Complaint, which sounds in "Quantum Meruit", Plaintiff states that the

"fair value of the services rendered" by him for Defendants is "10% of the gross proceeds realized from production" from the oil and gas prospects introduced by him. He asks for an award of that value in his prayer to Count II.

In testimony, BARTLEY stated that he was to receive a perpetual 10% of the cash flow from all successful prospects that he introduced to the Venture and that he would not be liable for any of the Venture's costs or losses. He demonstrated, through submission of Handelsman Venture Group's Accounting Ledger (Joint Appendix, Page 248), that he received precisely that interest in conjunction with the Trendwell prospect which he introduced to the Venture contemporaneously with the Ward Lake prospect.

At Page 10 of his Brief to the Court of Appeals, Petitioner quoted from Williams' and Meyers' treatise on oil and gas law, the definition of a "carried interest." The Court of Appeals went astray in its analysis when it equated a "permanent carried interest" with a

"net profits interest." Perhaps in arguing the point, the undersigned should have quoted further from Williams' and Meyers' Manual of Oil and Gas Terms Annotated. Reference to the definition of a "permanent carried interest" as set forth therein discloses that the same is "treated as the equivalent" of a net profits interest "for tax purposes" only. [See definition at page 28 of the Appendix. See also 2 Williams & Meyers, Oil and Gas Law, §424.1, Page 445, a copy of which appears at page 29 of the Appendix.] The concept of a net profits interest was discussed at Page 10 of BARTLEY's Brief to the Court of Appeals only for the purpose of analogy and distinction.

BARTLEY has consistently testified and alleged under oath that his "10% carried interest" entitles him to 10% of the gross proceeds of production from the leasehold interests acquired by the Venture, for the life of those leases. The burden of the costs of drilling, completing and operating the wells or

those leases, by definition and testimony, is to be borne solely by Defendants as the "carrying party" and reimbursed out of proceeds of production attributable to their leasehold interest, if any. In negotiating this arrangement with Handelsman, BARTLEY insisted on a carried interest because he recognized that he would have no control over "how profits were determined." (Joint Appendix, Page 353)

Based upon his testimony and allegations, BARTLEY is entitled to payment of 10% of the gross proceeds of production from all wells situate upon leases introduced by him to the Venture commencing on the date of first production therefrom, and continuing for the life of those leases. All costs associated therewith are to be borne by Handelsman. Such an interest is distinguished from a "net profits interest" in that the latter is a percentage or fractional share of the proceeds of production from a property measured by the net profits generated thereby. That is to say, a portion of

the proceeds of production remaining after payment of all costs associated with generating that production. The distinction is that the proceeds attributable to BARTLEY's carried interest are payable without regard to the profitability of the well or wells.

The two types of oil and gas leasehold interest are analogous from a tax standpoint as discussed by Williams and Meyers, since the recipient of both is entitled to a stream of cash which is net income to the recipient. However, the volume of that cash flow differs in that the recipient of a permanent carried interest receives a substantially greater income from any given level of production.

As appears from the foregoing, BARTLEY has neither confused the concepts nor contradicted himself. He seeks Judgment for the monetary value of his oil and gas leasehold interest which is "10% of the gross proceeds of production" from all oil and gas drilling prospects introduced by him to Defendants.

The Court of Appeals erred by equating the terms "permanent carried interest" and "net profits interest" for all purposes when the latter was discussed only analogously by counsel for BARTLEY in an attempt to aid the Court of Appeals in understanding the testimony and sworn allegations concerning the definition of the interest the parties agreed to. The Court of Appeals has confused the terms by construing them to be synonymous. That confusion was apparently created by Appellate Counsel's failed attempt to compare and contrast those terms in briefing the issue.

As observed by Dissenting Judge Contie, BARTLEY proffered his interest in the Trendwell prospect, as accounted for by Defendants (Joint Appendix, Page 248), as definitive of the interest to which he is entitled in the Ward Lake prospect.

While Defendants vehemently deny any agreement whatsoever with BARTLEY, their actions in so accounting for his interest in the

Trendwell prospect speak louder than their words.

The words and conduct of the respective parties clearly demonstrate sufficient "meeting of the minds" to establish an express contract or a contract implied in fact to pursue a joint venture, as asserted and argued hereafter.

Even the Respondents have not and do not argue that Petitioner has failed to assert an agreement whereby he would bear none of the loss, cost or expense of the venture. They assert the contrary. As stated at Page 3 of their Reply Brief (R.100):

> "plaintiff has been insistent that he was neither to share in any losses (such as the Otsego project) nor in any liability for potential losses or expenses. . . . plaintiff only claims the **benefits** of a joint venture agreement while specifically denying any of the burdens of a joint venturer. (04/29/91 BB, 177.) . . . According to the plaintiff, he was to receive his $2,000 monthly salary regardless of whether the joint venture fared well or poorly (03/29/90 BB, 130-134; 01/22/91 BB, 151-153); furthermore, he was only to be a joint venturer as to profits, not as to losses (04/29/91 BB, 177). In contrast to this, defendant

Handelsman was exposed to severe personal liability, since he laid out vast sums of his own money without any guarantee of it being recouped through the sale of limited partner interests. (01/23/91 RH, 83-87.)"

ARGUMENT I

The Court of Appeals erred in granting Summary Judgment as to Count I

Definition of Joint Venture

Case law in Michigan has defined a joint venture as "an association to carry out a single business enterprise for profit." It has six (6) elements:

1. An agreement indicating an intent to undertake a joint venture;
2. A joint undertaking of;
3. A single project for profit;
4. A sharing of profits as well as losses though liability for losses or expenses may be affected by the terms of the contract;
5. A contribution of skill or property by the parties; and
6. Community of interest and some control over the subject matter of the enterprise.

Goodwin v S.A. Healy Co., 383 Mich 300, 308-309 (1970); Summers v Hoffman, 341 Mich 686,

692, (1955); Grabendike v. Adix, 335 Mich 128, 139 (1952); Hathaway v Porter Royalty Pool, Inc., 296 Mich 90, 102-103 (1941); Reed & Noyce, Inc. v Municipal Contractors, Inc., 106 Mich App 113, 117 (1981).

The Michigan Supreme Court early on decided that projects for the development of oil wells are joint ventures, imposing upon the parties thereto strict obligations of good faith and fair dealing toward each other. Johnson v Ironside, 249 Mich 35, 44-46 (1929). Between joint venturers, the law imposes the highest degree of integrity, full disclosures and fairness. 15 Callaghan's Michigan Civil Jurisprudence, Joint Adventurers, § 19 N. 1, p. 235; 2 Williams & Meyers, Oil and Gas Law, § 437.1 p. 522.1-523, and authorities cited therein. In the words of Justice Cardozo,

> "Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the

market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exemptions. Wendt v Fischer, 243 N.Y. 439, 444, 154 N.E. 3030. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court." Meinhard v Salmon, 164 N.E. 545, 546-47 (1928).

The Michigan Supreme Court has embraced and adopted the Meinhard reasoning. VanStee v Ransford, 346 Mich 116, 126-128 (1956). In the case of Lane v Wood, 259 Mich 266, 269 (1932) it stated:

> "Within the scope of the enterprise they stand in a fiduciary relation each to the other, and are bound by the same standards of good conduct and square dealing as are required between partners. This obligation begins with the opening of the negotiations for the formation of the syndicate, applies to every phase of the business which is undertaken, and continues until the enterprise has been completely wound up and terminated." (Emphasis Added.)

The managing partner in a joint venture, in particular, owes a fiduciary duty to the other

participants, and is prohibited from acquiring for his own benefit any interest on the basis of information obtained in the performance of his duties as such. He holds any interest so acquired in constructive trust for the benefit of the venturer entitled thereto. 2 Williams & Meyers, Oil and Gas Law, § 437.1 p. 522.1-523, and authorities cited therein.

Necessity of a Written Contract

Quite clearly, the joint venture asserted by Petitioner herein does not require a writing. In fact, in a case strikingly similar to the one at bar, the Michigan Supreme Court in Summers v Hoffman, 341 Mich 686, 690, 692 (1955), concluded that the dealings of the parties contemplated by their oral agreement constituted a joint venture.

Meeting of the Minds

Whether the parties to this cause created the relationship of joint venturers depends upon their intent. 15 Callaghan's Michigan Civil Jurisprudence, Joint Venturers, § 9, N. 2, p.

227, and authorities cited therein. The parties' intentions are to be determined in accordance with the ordinary rules governing the interpretation and construction of contracts. 15 Callaghan's Michigan Civil Jurisprudence, Joint Ventures, § 9, N. 4, p. 228, and authorities cited therein.

The oft stated rule that a contract requires a "meeting of the minds" is only a figurative way of saying that there must be mutual assent. The existence of the parties' intent in this regard is judged by an objective, not a subjective standard, looking to the expressed, not the unexpressed words of the parties, and their visible acts. 5 Callaghan's Michigan Civil Jurisprudence, Contracts, § 24, N. 7 & 8, p. 589, and § 158, pp. 719-722, and authorities cited therein.

Oral contracts are to be regarded in light of the circumstances surrounding their execution and should be construed to effectuate the intent of the parties at the time. Redinger v Standard

Oil Company, 6 Mich. App. 74, 79 (1967). Where the proofs rest on imperfect recollections, and there is opportunity for misunderstanding, courts should incline to charitable views in construing parol contracts and ascertaining the motives and intentions of the parties. A parol contract is not to be defeated merely on the ground that informal circumstances surround the transaction. Refusal to reduce an oral contract to writing will not have the effect of rendering nugatory an otherwise valid agreement. Callaghan's Michigan Civil Jurisprudence Contracts, § 157, p. 718, and authorities cited therein.

While the facts herein related are certainly sufficient to demonstrate the existence of an express parol agreement between the parties, they also demonstrate quite clearly all of the elements necessary to establishment of a contract implied in fact.

Implied contracts are those which arise under circumstances which, according to the

ordinary course of dealing and common understanding of persons, show a mutual intention to contract. There are two kinds of implied contracts, one implied in fact, and the other implied in law. A contract implied in fact does not exist unless there is a "meeting of the minds" between the parties by reason of their words or conduct. The second is quasi or constructive, and does not require a "meeting of the minds", but is imposed by fiction of law to enable justice to be accomplished, even if no contract was intended. The essential element of a quasi-contractual obligation, on which a recovery may be had, is the receipt of a benefit by a defendant from a plaintiff, which it is inequitable for the defendant to retain. The theory to be applied is that of unjust enrichment. 5 Callaghan's Michigan Civil Jurisprudence, Contracts, § 273, and § 274, pp. 834-836, and § 282, pp. 846-848, and authorities cited therein.

Whenever a benefit accrues to a party,

whether for services rendered or otherwise, on which a duty to make compensation arises, the law will in the absence of an express promise to make compensation, imply one from the transaction. 5 Callaghan's Michigan Civil Jurisprudence, Contracts, §281, p. 844, and authorities cited therein.

The Court herein is confronted with a set of factual circumstances under which it may find:

1. An express contract as alleged by BARTLEY arising out of the specific words and actions of the parties;

2. A contract implied in fact arising out of the conduct of the parties the language used by the parties in discussing their relationship; and by the circumstances surrounding the transaction; or

3. A contract implied in law arising out of the words and actions of the parties and the circumstances, providing for a recovery in quantum meruit, if it concludes that no express or implied contract existed. 5 Callaghan's Michigan Civil Jurisprudence, Contracts, § 275, N. 10, pp. 837-839, and authorities cited therein.

Both the Trial Court and the Court of

Appeals, in their rulings, went outside the adversarial issues presented by the parties in Defendants' Motion for Summary Judgment and deprived BARTLEY of an opportunity to meaningfully respond to the basis for those decisions.

BARTLEY has repeatedly and consistently asserted that, at their original meeting at Weber's Inn in Ann Arbor, he and HANDELSMAN agreed that, as compensation for his participation in the joint venture, he was to receive a 10% "**carried**" interest in all oil and gas drilling prospects introduced by him and acquired by the venture. (Sworn Complaint, Paragraphs 10, 13 and 17; R.33: BARTLEY dep. of 8/29/90, p. 31-33, 115-116; R.76, 77: BARTLEY dep. of 1/22/91, p. 139-143, 153-159, 161-168, 176-178, 181-183 and 223-224) Witness Oesterle supports BARTLEY's recitation of the agreement reached at Weber's Inn. (R.33: Exhibit 1, p. 11-14 of BARTLEY dep. of 8/29/90; R.34: OESTERLE dep. p. 45-54, 62-63, 71, and 98-104) BARTLEY

has consistently so argued herein. (R. 31: Plaintiff's Brief Opposing Defendants' (first) Motion for Summary Judgment, p. 1, 2 and 3; R.97: Plaintiff's Brief Opposing Defendants' (second) Motion for Summary Judgment, p. 1, 2 and 4; R.126, 131: Transcript of 8/8/91, p. 7)

In defining the term for defense counsel, BARTLEY explained in his own words that his interest being "**carried**" meant that he would bear no such losses, costs or expenses. (R.33: BARTLEY dep. of 8/29/90, p. 31-33) By the same token, if the leases acquired by the joint venture were unproductive, BARTLEY would have a carried interest in nothing. (R.83: BARTLEY dep. of 4/29/91, p.177; R.34: OESTERLE dep. p. 103-104)

HANDELSMAN admitted on tape that BARTLEY had been given a 10% carried interest in the Trendwell project. (R.33: Exhibit 4 to BARTLEY dep. of 8/29/90) HANDELSMAN paid for that interest. (R.75: MALL dep. p. 18-19, 27-29, 35) HANDELSMAN accounted for that interest as a cost

free "carried" interest. (R.102, 103: ASHTON dep. p. 49-59 and Exhibit 6 thereto.)

The term "carried interest" is a term of art employed in the oil and gas industry. HANDELSMAN demonstrated a working understanding of the term. (R.76, 77: BARTLEY dep. of 1/22/91, p. 157, 164-165 and 181-183)

A "carried interest" is defined as follows:

> "A fractional interest in oil and gas property, usually a lease, the holder of which has no personal obligation for operating costs, which are to be paid by the owner or owners of the remaining fraction, who reimburse themselves therefor out of production, if any. The person advancing the costs is the carrying party and the other is the carried party." 8 Williams & Meyers, Oil and Gas Law, Manual of Oil and Gas Terms Annotated, p. 113-116; 2 Williams & Meyers, Oil and Gas Law, § 424, Page 437.

A "permanent carried interest" is a carried interest which is to be carried for the life of the lease. It is treated as the equivalent of a net profits interest. 8 Williams & Meyers, Oil and Gas Law, Manual of Oil and Gas Terms Annotated, p. 701-702.

A "net profits interest" is a share of gross production from a property, measured by net profits from operation of the property. It is carved out of the working interest. 8 Williams & Meyers, Oil and Gas Law, Manual of Oil and Gas Terms Annotated, p. 600.

Applying the terms used by the parties herein to define their joint venture, it becomes clear that BARTLEY's interest was intended by all to be a permanent carried interest. BARTLEY was the "carried party" and HANDELSMAN was the "carrying party". By definition, BARTLEY was to have no liability for any of the losses, costs, or expenses of the venture and HANDELSMAN was to bear all of the same.

Nonetheless, as a matter of fact and law it cannot be said that, under the agreement asserted, BARTLEY bore no risk of loss whatsoever. The logic employed by the Michigan Supreme Court in the Summers v Hoffman case is instructive in this regard. The Defendants therein presented virtually the same argument

as HANDELSMAN does here. At Page 693 of the Summers Opinion appears the following pertinent passage:

> "But defendants claim that under the agreement plaintiff would not share any losses or bear the risk of loss in case of an adverse decision in the suit involving the title to the property. With this contention we cannot agree. 'Loss' does not necessarily mean 'monetary loss.' If the land was eventually sold at a loss the result would be that plaintiff's expenditure of time would have been for naught as would defendants' monetary investment. If the title litigation had been decided adversely then plaintiff would have lost large out-of-pocket expenses and the value of the time which he had theretofore spent on the project which, while not quite as concrete or measurable as defendants' cash investment, is nevertheless a loss. It cannot be said that the plaintiff did not share any risk of loss, for as we said in Hathaway v Porter Royalty Pool, Inc., supra (Page 103):
>
> > 'Though the liability of a joint adventurer for a proportionate part of the losses or expenditures of the joint enterprise may be affected by the terms of the contract.' "

The Michigan Supreme Court in the Summers case charted the legal course which, if

navigated properly by this Court, will lead to judgment in favor of BARTLEY.

While the facts and legal arguments in the Summers case bear striking similarity to those at bar, the Michigan Supreme Court decision in the case of Grabendike v Adix, 335 Mich 128 (1952) is also instructive. In that case the Michigan Supreme Court specifically held that a carried interest arrangement in an oil and gas transaction, similar to that involved here, constituted a joint venture. Grabendike v Adix, 335 Mich 128, 131 and 139-140 (1952).

Joint Venture Elements

Assessing the factual record herein developed in a light most favorable to BARTLEY, one must conclude that the parties did in fact arrive at an agreement whereby they intended a joint undertaking to acquire, promote, and manage interests in oil and gas drilling programs in Otsego County, Michigan, for profit. (Joint Venture Elements 1, 2 and 3.) BARTLEY performed all of his responsibilities in that

respect and did in fact acquire his agreed upon interest in the Trendwell Prospect, which HANDELSMAN paid for. Respondents' argument that BARTLEY was somehow acting as a "finder" or "factor" for Trendwell Oil in securing that interest is belied by the record. (R. 75: MALL Dep. pp. 70-71; R. 33: BARTLEY Dep. of 8/29/90 pp. 121-122)

There is also little room for argument that the fifth element of a joint venture as set forth above exists here. BARTLEY early on contributed his resources, skill and effort in locating and bringing to the venture reputable and capable operators with good drilling prospects and long term commitments from utilities to purchase any gas produced. After fulfilling his responsibility to his partners by locating and introducing those prospects to the venture, he went the extra yard and participated extensively in the negotiation and formalization of the terms of acquisition of those prospects by the venture. As agreed by the parties,

HANDELSMAN contributed financially to the acquisition of the prospects in question. At no time was BARTLEY expected to contribute financially thereto.

That the parties have a community of interest and some control over the Trendwell and the Ward Lake Prospects is without doubt. (Sixth Element) That community of interest and control was divided 90/10 between HANDELSMAN and BARTLEY. The value of BARTLEY's interest in HVG is directly and proportionately related to prospects acquired by the venture. BARTLEY's degree of control over the subject of the enterprise is clearly demonstrated by the incident referred to at page 26 of Respondents' Brief to the Court of Appeals. When HANDELSMAN proposed to transfer all of the interest acquired by HVG in the Trendwell Prospect to a limited partnership, BARTLEY asked of his partners the logical question: "What am I to be paid for my share?" The answer was "$10". HANDELSMAN expected BARTLEY to transfer his

vested interest in the Trendwell Prospect to a limited partnership entity controlled by HANDELSMAN with virtually no present or future consideration flowing to BARTLEY. Not surprisingly, BARTLEY refused to do so. HVG was, for that reason, unable to commit its entire interest in the Trendwell Prospect to the proposed limited partnership. (R. 33: BARTLEY Dep of 8/29/90 pp. 86-89; R. 76, 77: BARTLEY Dep. of 1/22/91 pp. 172-175)

To the limited extent that Respondents address the sixth element of a joint venture, they seem to argue that BARTLEY must be able to demonstrate that he and his alleged venturers jointly acquired legal title to the prospects which were the subject of the venture. That argument is clearly wrong. The Summers decision does not so provide. A joint interest in title to the Ward Lake Prospect, or the value thereof, is the **relief** prayed for herein by Plaintiff.

Plaintiff in the Summers v Hoffman case sought the same type of relief. In that case,

two parcels of real estate were involved. Defendant and Plaintiff had taken joint ownership of one of the parcels (as in the case herein with the Trendwell Prospect). The parcel which Defendants acquired in their name only was at issue in that case (as is the Ward Lake Prospect herein). Respondents' attempts to distinguish the factual situation involved in the Summers decision from the case at bar must fail. The more one analyzes the factual situation involved therein, the more it appears to match the circumstances of the current controversy. As sated in BARTLEY's Brief to the Court of Appeals, that case will guide this Court to the unavoidable conclusion that he must prevail herein.

I have reserved until now discussion of the fourth element of a joint venture as defined by Michigan law. It is dealt with last only because the Decision appealed to the Court of Appeals rested very narrowly on the existence of that element. Virtually all of BARTLEY'

arguments in that appeal revolve around factual and legal issues pertaining thereto. Respondents dedicated little argument to that issue and cited no Michigan authority whatsoever in support of their position thereon.

Both BARTLEY and OESTERLE have testified at length that it was the agreement of the parties that BARTLEY would not bear any of the losses, costs, or expenses of the venture because his share of the leases to be acquired was to be a "carried interest". Respondents accepted that proposition as true, but argued that such an arrangement operates to defeat a joint venture relationship between the parties. The only law cited in support of their position is the Texas case of Brown v Cole,. 291 S.W. 2d 704, 709 (1956, aff'd 291 S.W. 2d 704 (1956) [SIC]; 59 ALR 2d 1011 (1956) an the Louisiana case of Frazell v United States, 213 F. Supp 457 (W.D.La., 1963), in dicta. In alluding to Michigan law at page 37 of their Brief to the Court of Appeals, Respondents asserted without

citation of authority, that:

> "the case law does not say that a joint venturer may completely **excuse** himself from sharing in the losses, only that the terms of the contract may **affect** it."

Respondents' reliance upon the Texas and Louisiana decisions is misplaced. Their argument concerning the status of Michigan law is simply wrong.

The law pertaining to joint ventures seems to vary in substantial degree from state to state. Some jurisdictions have held that a duty to share losses must exist before a joint venture can. However, a substantial number of other jurisdictions have held that the sharing of losses is not essential to the existence of a joint venture. 46 Am Jur 2d, Joint Ventures, § 13 p. 35-36 notes 10-15. Texas and Louisiana just happen to be two of the states which mandate a duty to share losses. The Brown v Cole case established that precedent in the State of Texas. It may be that "A majority of American jurisdictions 'look to loss sharing as an essential element of partnership or joint

venture'", a statement which Defense counsel cites as dicta in the Frazell decision. Michigan, however, is clearly not within that "majority". Decisions of the Michigan Supreme Court make it clear that the parties to a joint venture may contract away loss sharing responsibilities of the principals. Rossman v Marsh, 287 Mich 720, 729-730 (1939); Keiswetter v Rubenstein, 235 Mich 36, 44-45 (1926); Dutcher v Buck, 96 Mich 160, 166-167 (1893); Sager v Tupper, 38 Mich 258, 259, 265 (1878).

Since the joint venture agreement claimed by BARTLEY revolves around his acquisition of a "**carried interest**" in the oil and gas leases acquired by the venture, and since that term is one of art, not generally used outside of the oil and gas industry, it would appear that the conclusions of the Trial Court and the Court of Appeals arose from a patent misunderstanding of BARTLEY's legal and factual position. That error was not one of reasoning but of apprehension. It is apparent that those Courts

have not dealt as a matter of course with factual and legal circumstances involving the specialized field of oil and gas law. Their lack of familiarity with the factual and legal nuances of the oil and gas industry, it appears, precipitated the error herein complained of. Both Courts should have granted BARTLEY's Motions for Reconsideration. Instituto Nacional de Comercializacion Agricola (Indeca) v Continental Illinois National Bank & Trust Co., 576 F. Supp. 991, 1001 (1983, ND IL); Above the Belt v Mel Bohannon Roofing, Inc., 99 F.R.D. 99, 101 (1983, E.D. VA).

For the foregoing reasons Summary Judgment in favor of Defendants on Count I of BARTLEY's Complaint was in error and the Order therefor should be set aside.

ARGUMENT II

The Court of Appeals erred in granting Summary Judgment as to Count II

As hereinabove stated, the Court of Appeals also granted Summary Judgment in favor of Respondents on Count II of BARTLEY's Complaint.

This ruling is also erroneous.

It is clear from the record that BARTLEY invested considerable time, effort and expense to the great benefit of the Venture or HANDELSMAN, with the full knowledge and consent of HANDELSMAN. (R.33: Exhibit 1, p. 15 of BARTLEY dep. of 8/29/90; R.76, 77: BARTLEY dep. of 1/22/91, p. 151-152, 195, and 237; R.34: OESTERLE dep. p. 112-117) Under the circumstances, Defendants are estopped from asserting the Statute of Frauds in defense of Plaintiff's claim. It is well settled that the doctrine of promissory estoppel can be invoked to defeat such defenses. Clark v Coats & Suits Unlimited, 135 Mich App 87, 98 (1984). The Federal Courts of the Eastern District of Michigan have adopted the application of the law of estoppel made in the Clark case. See, Cattin v General Motors Corp., 641 F. Supp. 591, 596 (E.D. Mich, 1986).

The elements of equitable or promissory estoppel are:

1. A promise;

2. That the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee;

3. Which in fact produced reliance or forbearance of that nature; and

4. Under such circumstances that the promise must be enforced if injustice is to be avoided.

BARTLEY's claim fits precisely within the circumstances related in the Clark case. HANDELSMAN'S promise to perform in keeping with the terms of the joint venture agreed upon induced BARTLEY to commit considerable time, expense, and effort on behalf of the Venture, and resulted in a substantial financial benefit to the Venture. BARTLEY's performance derived from his reliance upon the promise made by HANDELSMAN, which under the circumstances must be enforced if injustice to BARTLEY is to be avoided.

To allow Respondents to rely upon the

Michigan Statute of Frauds to bar recovery by BARTLEY would not only defeat the legislative purpose thereof, but would allow Respondents to utilize that very statute to perpetuate a fraud.

Recognizing the foregoing, the Michigan Supreme Court in the case of Ordon v Johnson, 346 Mich 38 (1956), at pages 48-49 of its Opinion, specifically ruled that recovery on a quantum meruit theory may be had where Plaintiff has performed services under an agreement which is not otherwise enforceable because of the Statute of Frauds, or some other statute that prevents recovery on the terms of the agreement itself. See also, 11 Callaghan's Michigan Civil Jurisprudence, Statute of Frauds, § 160, p. 142, and authorities cited therein.

For the foregoing reasons, Summary Judgment on Count II of BARTLEY's Complaint was in error, and the Order therefor should be set aside.

ARGUMENT III

The Court of Appeals erred in ruling that no genuine issue of material fact exists

FRCP 56(c) provides quite clearly that summary judgment may not be rendered unless there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The material issue of fact existing in this cause is "Did the parties agree to embark upon the venture asserted by BARTLEY?"

The fact that the Court of Appeals was split by Senior Judge Contie's dissent on this issue shows quite clearly that the record "presents a sufficient disagreement to require submission to a jury" and that the evidence is not "so one-sided that one party must prevail as a matter of law." Street v. J.C. Bradford & Co., 886 F. 2d 1472, 1478 (6th Cir., 1989).

In ruling upon a Motion for Summary Judgment, the Court is not permitted to decide issues of fact, it may only determine whether or not issues of fact exist. Caylor v Virden, 217

F.2d 739, 741 (1955, CA 8 MO); EEOC v May & Company, 572 F. Supp. 536 (1968, ND GA).

Summary judgment should be granted only if the entire record shows the right to such judgment leaving no room for controversy, showing affirmatively that plaintiff cannot prevail under any circumstances. Prince v Pittson Company, 63 FRD 28 (1974, SD W VA).

In deliberating upon a Motion for Summary Judgment, the court must construe evidence in favor of the party opposing the motion in its most favorable light, and against the moving party. Bohn Aluminum & Brass Corp. v Storm King Corp., 303 F. 2d 425 (1962). Facts asserted by the party opposing the Motion for Summary Judgment must be regarded as true. VanHouten Service, Inc., v Shell Oil Co., 417 F.Supp 523 (1975, DC NJ).

The "economic reality" of this case is that Respondents needed BARTLEY's skills in order to pursue their Antrim drilling venture. (R.34: OESTERLE Dep. p. 42-43) Matsushita Elec.

Industrial Co., v Zenith Radio Corp., 475 U.S. 574, 587 (1986).

The Court of Appeals concluded that "BARTLEY has failed adequately to define or explain the interest he claims in this suit "(emphasis added) because of its erroneous perception of his Counsel's analysis of the term "carried interest." BARTLEY was clear on this point, the Courts below were not. In so concluding, the Court of Appeals identified a genuine issue of fact and decided that issue in favor of Respondents, giving greater credibility to Respondents denial of the fact than to Petitioner's assertion thereof. This the law of summary judgment clearly prohibits. To do so deprives BARTLEY of his claimed interest in HVG without due process of law. (U.S. Const., 14th Amend., Sec. 1)

In cases such as this where the terms of the alleged oral contract are complex and involved, the matter should be tried in its entirety, and not merely upon highlighted

questions and answers given during pre-trial discovery. Tagtmeier v. Smith, 23 FRD 32 (1958, ED Pa).

In an action for breach of contract, where the complaint sufficiently raises the issue of existence of a contract, Plaintiff is entitled to have that issue tried in an ordinary manner as an issue of fact. Aronson v. K. Arakelian, Inc., 154 F. 2d 231, 234 (1946, CA 7, Ill) See also Olympic, Jr., Inc. vs. David Crystal, Inc., 463 F. 2nd 1141, 1147 (1972, CA 3, NJ).

Subjective questions of knowledge, state of mind, or intent, are inappropriate for summary disposition. Whether the parties had knowledge of facts which should lead them to inquire as to the existence of a contract involved a subjective question of knowledge which must await consideration by the finder of fact. Runyan v. United Brotherhood of Carpenters, 566 F. Supp. 600, 607 (1983, DC Colo)

Summary Judgment is an extreme remedy and should not be entered unless the movant has

established that he has the right to Judgment, and that the other party is not entitled to recover, under any discernable circumstances. Ozark Milling Company, Inc. v. Allied Mills, Inc., 480 F. 2d 1014, 1015 (1973, CA 8, Ark).

In this case it was incumbent upon Respondents' as moving party to convince the Court that no facts exist herein which establish formation of the oral agreement alleged by BARTLEY. As hereinabove set forth, the record is replete with facts which would establish the existence of such an agreement. Accordingly, Respondents' Motion for Summary Judgment should have been disallowed by the Court of Appeals. Gertner v. Hospital Affiliates International, Inc., 602 F 2d 685, 689 (1979, CA 5, Tex).

The Court of Appeals should have applied the same standard as the Trial Court in reviewing its decision to grant Summary Judgment. Summary Judgment is an extreme and treacherous remedy and should not be entered unless the pleadings, stipulations, affidavits

and admissions show that there exists no genuine issue as to any material fact, unless the movant has established its right to judgment with such clarity as to leave no room for controversy, and unless the other party is not entitled to recover under any discernable circumstances. Vette Company v. Aetna Casualty & Surety Company, 612 F 2d 1076, 1077 (1980, CA 8, MO).

This standard of review is a rigorous one and not even one chink in the armor of the Court's decision can be vulnerable to question. Taking facts and inferences most favorable to the losing party, the question is whether the trier of fact nevertheless would have to find against him. Rogen v. Ilikon Corp, 361 F 2d 260, 266 (1966, CA 1, MASS).

Likewise, the Supreme Court looks at the record on Summary Judgment in a light most favorable on the party opposing the motion. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473, 82 S. Ct. 486, 491 (1962). See also United States v. Diebold, Inc., 369

U.S. 654, 655 82A S. Ct. 993, 994 (1962).

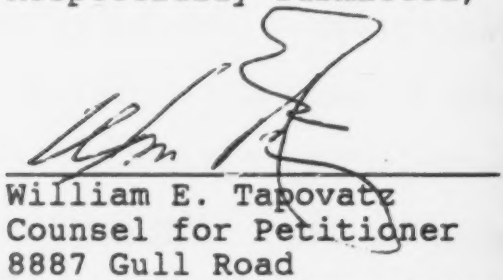
Applying the law of Summary Judgment to the facts hereinabove related, it is clear that Respondents' Rule 56 Motion for Summary Judgment should have been denied.

CONCLUSION

For the foregoing reasons, BARTLEY respectfully prays that his petition for a writ of certiorari be granted.

DATED: July 28, 1993.

Respectfully Submitted,



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NOT FOR PUBLICATION

FILED

NOS. 91-2201 & 92-1429

APR 19 1993

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LEONARD GREEN, Clerk

Brian M. Bartley,	90-71419
	D/Gilmore
Plaintiff-Appellant	
	ON APPEAL FROM THE
v.	UNITED STATES DISTRICT
	COURT FOR THE EASTERN
Richard A. Handelsman & Handelsman Venture Group,	DISTRICT OF MICHIGAN
Defendants-Appellees	

NOT RECOMMENDED FOR FULL TEXT PUBLICATION
Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be prominantely displayed this decision is reproduced.

BEFORE: MILBURN and BATCHELDER, Circuit Judges, and CONTIE, Senior Circuit Judge.

PER CURIAM.

I.

Brian Bartley brought suit against Richard Handelsman and an investment group headed by Handelsman alleging that Bartley, Handelsman and another man had, over breakfast and without written contract, formed a joint venture to seek out and fund promising oil and gas investments.

Bartley's claimed role was to do the legwork, researching potential sites and making any necessary arrangements with owners to obtain leases, set up drilling contracts, and the like. Handelsman apparently would supply the money. Bartley maintained in his original complaint that for his efforts, Handelsman promised him a "ten percent carried interest" in any and all oil and gas prospects that made money; since he would be contributing only his labor and expertise to the joint venture, he would not be liable for any costs or losses the adventurers sustained. The District Court granted the Handelsman defendants' motion for summary judgment, holding that under Michigan law, all joint adventurers had to share in the costs and losses as well as the profits to make out a legal joint venture. We affirm.

II.

The Court of Appeals reviews grants of summary judgment motions *de novo*. In reviewing

a summary judgment disposition, the Court of Appeals must determine whether the party opposing the motion has put forth evidence which, if produced at trial, would withstand the movant's motion for a directed verdict. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1478 (6th Cir. 1989) (citing *Anderson v. Liberty Lobby*, 447 U.S. 242 (1986) and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)). Of course, the movant must initially show the absence of a genuine issue of material fact. *Street*, 886 F.2d at 1479 (citing *Celotex*, 477 U.S. at 323). A material fact is one which might affect the outcome of the suit. *Liberty Lobby*, 477 U.S. at 248. However, the court must determine whether the evidence before it on a motion for summary judgment "presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Street*, 886 F.2d at 1479 (citing *Liberty Lobby*, 477 U.S. at 252). Bare allegations by the non-moving party will not

alone suffice; they must be supported by sufficient evidence such that "reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict." *Mitchell v. Toledo Hospital*, 964 F.2d 577, 581-82 (6th Cir. 1992) (quoting *Liberty Lobby*, 477 U.S. at 252).

The District Court erred in holding that Mr. Bartley could not be a joint adventurer under Michigan law if he had not agreed to bear any of the venture's risk of costs or losses. A Michigan joint venture may reimburse a joint adventurer acting as a prospector for his services by granting him a percentage interest in the prospects he finds; Michigan law considers the prospector to be risking his up-front "investment" of labor and time in the hopes of getting a future payoff from productive wells. *See Miles v. Fredenhagen*, 309 Mich. 674, 16 N.W.2d 117 (1944).

Where the District Court has erred in its grant of summary judgment, the Court of Appeals

may nonetheless affirm the grant of summary judgment on other grounds.

> [A]n appellate court can find an alternative bases for concluding that a party is entitled to summary judgment and ignore any erroneous basis relied upon by the district court, provided it proceeds carefully so the opposing party is not denied an opportunity to respond to the new theory.

Hansard v. Barrett, 980 F.2d 1059, 1061 (6th Cir. 1992) (quoting *Hines v. Joy Manufacturing Co.*, 850 F.2d 1146, 1150 (6th Cir. 1988)). Because we find that Bartley has failed adequately to define or explain the interest he claims in his suit, and since Bartley has had adequate opportunity to brief and argue this issue before this court, we grant summary judgment in favor of the Handelsman defendants on alternative grounds.

Mr. Bartley runs into trouble in alleging that the joint venturers promised him a ten percent "carried interest" as his primary compensation for his efforts in identifying and researching promising oil and gas prospects. This promise is a material term of the contract

which he alleges, one which would undoubtedly affect the outcome of the suit. *Liberty Lobby*, 477 U.S. at 248. For that reason, Mr. Bartley must put forth sufficient evidence to show that a jury could find that a meeting of the minds occurred on the promised compensation. *Banque de Depots v. National Bank of Detroit*, 491 F.2d 753, 756 (6th Cir. 1974). Were the allegations clear that the parties agreed to grant Mr. Bartley a ten percent "carried interest", the crucial questions would be whether Mr. Handelsman in fact agreed to such a grant at the breakfast meeting, and what specifically he intended to convey; this question would be for the finder of fact and would be beyond the pale of summary judgment. *Guilmet v. Campbell*, 385 Mich. 57, 188 N.W.2d 601 (1971). However, when the non-movant's allegations as to the material terms of an oral contact are in themselves vague, and the evidence used to support them unclear and ambiguous, a court may, as a matter of law, hold that no contract can be made out,

and keep the matter out of a jury's hands. *Kurtz v. Ford Motor Co.*, 62 F. Supp. 255, 257 (E.D. Mich., S. Div. 1945)("Where . . . the integral terms of an oral contract can only be arrived at by an excursion into the realm of conjecture and speculation, the court should not submit to the jury the matter of delineation of such terms.").

Neither the evidence Mr. Bartley puts forth nor the law he has argued is consistent in defining what interest the parties allegedly agreed to grant him. Bartley argues that Handelsman knew what interest he was promising, since a "carried interest" is a term of art in the oil and gas world. The latter is true, but the law recognizes many types of carried interests; the term is not self-defining. *See generally* Eugene Kuntz, *A Treatise on the Law of Oil and Gas* § 63.4 (1991). Simply claiming a "ten percent carried interest" is akin to claiming a "ten percent property interest"; to keep his suit alive, a plaintiff must define the

extent, nature and particularly the value of his claimed interest.

In his complaint, Bartley originally described the carried interest upon which he sued as "ten percent of the gross proceeds" of the various successful prospects he had found. When deposed, Bartley did not clearly define the interest he claims the parties agreed that he would receive, except to claim that it was to be a perpetual ten percent interest in the "cash flow" from the successful projects and that he would not be liable for any of the joint venture's costs or losses. In briefing this Court, Bartley argues that his interest pursuant to the alleged contract really boiled down to a "net profit interest." Again, such an interest is cognizable in oil and gas law, *see Kuntz, Oil and Gas* § 63.5 at 254, but it necessarily entitles the holder only to an interest in the profits, not the revenues, of a drilling venture, *id.*; by definition, an interest in revenues entitles the holder to more money than

does an interest in profits. Also implied in a net profits interest is that the holder bears the costs of production, unlike the holder of a percentage interest in revenues or "gross proceeds." Bartley thus contradicts himself by arguing that the "carried interest" to which he is entitled is at once an interest in revenues, free of liability for costs or losses, and an interest in net profits.

In order to withstand summary judgment in this case, Bartley had to present evidence tending to demonstrate that there is a genuine factual dispute about whether there was a meeting of the minds on some particular set of terms of this alleged contract. Instead, what Bartley has shown is that he himself has no clear notion of the nature of the interest that he claims he is entitled to receive under the contract he alleges. Where the plaintiff's claims arise under an alleged oral contract, and the dispute is over whether there was in fact any such oral contract, the plaintiff may

survive summary judgment by demonstrating that there is a genuine issue of fact as to whether there was ever a meeting of the minds of the parties in regard to the particular terms of that contract. Where the dispute is over a specific term or terms of that alleged contact, the plaintiff may survive summary judgment by providing evidence tending to demonstrate a genuine issue as to whether the parties agreed to the particular term or terms. But here, Bartley claims that the parties entered into an oral contract pursuant to which Bartley was entitled to an interest, which he vaguely describes in varying and wholly inconsistent terms throughout his pleadings and testimony. He has not provided any evidence whatsoever to define that specific interest. If Bartley himself does not know what his interest was to be, he can hardly be heard to claim that there was a meeting of the minds of the parties as to what his interest was to be. Thus, what Bartley has shown is that there was no meeting of the

minds as to that essential term of the alleged contract. And even if Bartley's claim is that there is a genuine dispute as to what that interest was to be, showing a genuine dispute about what was intended simply establishes the fact that there was no meeting of the minds.[1]

Bartley thus not only fails to define accurately the legal interest which he claims

---

[1] The dissent finds in a handwritten note appearing in one corner of a page in a ledger belonging to Handelsman proof of the nature of Bartley's claimed interest sufficient to withstand summary judgment. The evidence does show, and Mr. Handelsman does not dispute, that Bartley did receive a percentage interest in a gas drilling operation from Trendwell Oil, which is an independent company, and has received regular payments from Trendwell. However, showing the existence of this interest does not bring Bartley any closer to showing what interest, if any, Handelsman orally promised him with regard to future prospects. Bartley has not defined the nature of his Trendwell interest; he therefore cannot hold that interest out as showing that Handelsman and he agreed to the "same arrangement" for all future prospects Bartley brought to Handelsman's attention, or as showing that he was a "participant and partner in Handelsman Group," as Bartley claimed at his deposition and in his pleadings. As we have noted, the Supreme Court no longer thinks plaintiffs are entitled to try cases on the basis of a mere "scintilla" of disputed evidence.

Mr. Handelsman promised him, and fails to put forth sufficient evidence to support a jury verdict that he was entitled to any specific interest in future prospects developed by the alleged joint venture; he has affirmatively demonstrated that there was no meeting of the minds of the parties on this essential element of the contract which he claims. Where a plaintiff attempting to get past a motion for summary judgment has "fail[ed] to make a showing sufficient to establish the existence of an element essential to [his] case," the case cannot be allowed to proceed. *Celotex*, 477 U.S. at 323; *Collins v. Nagle*, 892 F.2d 489, 493 (6th Cir. 1989).

III.

Happily for him, the litigation well is not completely dry for Mr. Bartley. The District Court erred in taxing costs against him in the amount of $489.70 for the defendants' Federal Express charges. Courts have held that such charges fall outside the specific provisions of

28 U.S.C. § 1920, although in some instances courts have included them as part of awarded attorney fees. *See Miller v. Carson*, 628 F.2d 346 (5th Cir. 1980); *Michigan Carpenters Council Health and Welfare Fund v. Charles Rogers Construction Co.*, 1988 U.S. Dist. LEXIS 17836 (W.D. Mich. 1988); *Lincoln Tang How v. Edward J. Gerrits, Inc.*, 756 F. Supp. 1540 (S.D. Fla. 1990), *aff'd*, 961 F.2d 174 (11th Cir. 1992); *Hollenbeck v. Falstaff Brewing Corp.*, 605 F. Supp. 421 (E.D. Mo., E. Div. 1985), *aff'd*, 780 F.2d 20 (8th Cir. 1985). The fact that the District Court found them "proper and reasonable" is irrelevant; the clerk or the court may tax only those costs and fees specified in the statute. Thus, this taxation of costs is reversed.[2]

On the grounds we have discussed, the order

---

[2] Mr. Bartley also argues that he should not have been assessed for the defendants' travel expenses. As Mr. Handelsman points out in his brief, Bartley prevailed on this issue before the District Court, and such costs were not in fact assessed; the issue is therefore moot.

of the District Court granting the defendants' motion for summary judgment and dismissing Bartley's case is therefore AFFIRMED; the taxation of costs against Mr. Bartley for Federal Express expenses is REVERSED.

CONTIE, Senior Circuit Judge, dissenting.

Brian Bartley seeks a "ten percent carried interest" in Handelsman Venture Group's Ward Lake Drilling investment. Though Handelsman maintains, and my colleagues find, that Bartley "has failed to provide any details about the nature of the payments to which he claims an entitlement," Appellees' Brief at 26, Bartley clearly seeks the same "ten percent carried interest" that he currently receives from Handelsman Venture Group's Trendwell Oil investment:

> 11% Interest in Trendwell:
>
> | | | |
> |---|---|---|
> | R.H. | [Richard Handelsman] | 50% |
> | Jeff | [Wolfson] | 24% |
> | Mike | [Oesterle] | 16% |
> | Brian | [Bartley] | 10% |

Handelsman Venture Group's Accounting Ledger (Joint Appendix at 248).

Michigan Supreme Court precedent clearly proscribes summary judgment disposition of this action:

> A genuine issue of fact is created when the affidavits, pleadings, depositions, admissions and documentary evidence, viewed in the light most favorable to the party opposing the motion, might permit inferences contrary to the facts as asserted by the movant. Summary judgment is rarely appropriate where "motive and intent play leading roles."
>
> . . . .
>
> The trial court and the Court of Appeals majority carefully scrutinized the March 11 letter in order to ascertain the parties' intent. We eschew that approach, in part to emphasize that such a factual inquiry should have been made only by a trial court factfinder after consideration of all of the relevant evidence to be produced at trial on the point.

Opdyke Inv. Co. v. Norris Grain Co., 413 Mich. 354, 360-62 (1982) (citations omitted).

Accordingly, I dissent from the majority's opinion.

ISSUED AS MANDATE: 5-27-93
Costs: None
Filing Fee . . . . . $
Printing . . . . . $
TOTAL . . . . . $

FILED

Case No: 91-2201 , 92-1429

MAY 19 1993

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LEONARD GREEN, Clerk

O R D E R

BRIAN M. BARTLEY

Plaintiff - Appellant

v.

RICHARD A. HANDELSMAN; HANDELSMAN VENTURE GROUP

Defendants - Appellees

BEFORE: MILBURN and BATCHELDER, Circuit Judges;
CONTIE, Senior Circuit Judge

Upon consideration of the petition for rehearing filed by the appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**. Judge Contie adheres to his original dissent.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk

UNITED STATES DISTRICT COURT
EASTERN DIVISION OF MICHIGAN
SOUTHERN DIVISION

BRIAN M. BARTLEY,

Plaintiff, Case No. 90 CV 71419 DT

-vs- Hon. Horace W. Gilmore

RICHARD A. HANDELSMAN and
HANDELSMAN VENTURE GROUP,

Defendants.
_____/

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_____/

ORDER GRANTING DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT

At a session of said Court, held
in the City of Detroit, County
of Wayne, State of Michigan on
SEP 5 1991

PRESENT: HONORABLE HORACE W. GILMORE
U.S.D.C. Judge

This matter having come before the Court upon

Defendants' Motion for Summary Judgment; the Court having reviewed the submissions of the parties and having heard oral argument of counsel; and the Court being otherwise fully advised in the premises;

IT IS HEREBY ORDERED that, for the reasons stated on the record, Defendants' Motion for Summary Judgment is granted, and Plaintiff's Complaint is hereby dismissed with prejudice.

HORACE W. GILMORE
HORACE W. GILMORE
U.S.D.C. Judge

APPROVED AS TO FORM:

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A TRUE COPY

CLERK, U.S. DISTRICT COURT EASTERN DISTRICT OF MICHIGAN
BY /s/
DEPUTY CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BRIAN M. BARTLEY,

Plaintiff, HONORABLE HORACE W. GILMORE
Civil No. 90-1419

-vs-

RICHARD A. HANDELSMAN &
HANDELSMAN VENTURE GROUP,

Defendants.
_____/

ORDER DENYING MOTION FOR RECONSIDERATION

At a session of said Court, held in the Federal Building, City of Detroit, County of Wayne, State of Michigan,

on OCT 02 1991.

Present: Honorable Horace W. Gilmore
United States District Judge

Plaintiff having filed a Motion for Reconsideration of this Court's Order Granting Defendants' Motion for Summary Judgment, and the Court having reviewed the same, and the Court determining that no response or oral argument shall be allowed pursuant to Local Rule

17(m)(2);

IT IS ORDERED that Plaintiff's Motion for Reconsideration be and hereby is DENIED for the reasons stated at the hearing on Defendants' Motion for Summary Judgment held on August 8, 1991.

HORACE W. GILMORE
HORACE W. GILMORE
UNITED STATES DISTRICT JUDGE

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between -

(1) Citizens of different States;

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Rule 10. Consideration Governing Review on Writ of Certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

.2. The same general considerations outlined above will control in respect to a petition for a writ of certiorari to review a judgment of the United States Court of Military Appeals.

Rule 40. Petition for Rehearing

(a) Time for Filing; Content; Answer; Action by Court if Granted. A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

(b) Form of Petition; Length. The petition shall be in a form prescribed by Rule 32(a), and copies shall be served and filed as prescribed by Rule 31(b) for the service and filing of briefs. Except by permission of the court, or as specified by local rule of the court of appeals, a petition for rehearing shall not exceed 15 pages.

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Permanent Carried Interest

A Carried Interest (q.v.) which is to be carried for the life of the lease, as opposed to a Limited Carried Interest (q.v.) which is to be carried for the initial development phase only of the operation. **A permanent carried interest is treated as the equivalent of a Net Profits Interest** (q.v.), and hence, when a lease is conveyed, the grantor retaining a permanent carried interest, the transaction is treated as a lease rather than as a sale **for tax purposes.** See Burke and Bowhay, *Taxation of Natural Resources* § 4.01 (1980); "Carried Interests Revisited by Tax Court," 8 *O&G Tax Q.* 159 at 161 (1959).

Syn.: Unlimited carried interest.

If a carried interest is to continue for the duration of the leasehold, it will be treated as a net profits interest for purposes of federal income taxation.

Supreme Court, U.S.
FILED
SEP 15 1993
OFFICE OF THE CLERK

No. 93-239

In The

Supreme Court of the United States

October Term, 1993

BRIAN M. BARTLEY,

Petitioner,

vs.

RICHARD A. HANDELSMAN & HANDELSMAN VENTURE GROUP,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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22 pp

COUNTER STATEMENT OF QUESTIONS INVOLVED

This diversity action concerns whether under Michigan oil and gas joint venture law, Petitioner has set forth sufficient evidence to show that a trier of fact could find a meeting of the minds on an alleged promise by Respondents. In the absence of a written agreement, or any form of commitment signed by Respondents, Petitioner relies upon his varying versions of a breakfast conversation to assert that Respondents became bound, in contract or in *quantum meruit,* to compensate Petitioner beyond his $2,000 monthly salary with a ten percent oil and gas interest, which Petitioner has been unable to clearly define. The only question presented is as follows:

1. Where a plaintiff is unable to clearly define the interest to which he claims he is entitled and which interest constitutes an essential element of the oral contract he alleges, should the issue of whether the parties reached a meetings of the minds as to this essential element nonetheless be turned over to the trier of fact for determination?

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COUNTER STATEMENT OF THE CASE

Petitioner Brian M. Bartley ("Bartley") originally filed suit in the Circuit Court for the County of Washtenaw, State of Michigan seeking "a 10% (ten percent) carried interest in all oil and gas drilling prospects introduced by him" to Respondents. (Complaint, Para. 10/JA at 16).[1] The case was removed to the United States District Court for the Eastern District of Michigan because of diversity of citizenship of the parties and amount in controversy in excess of $50,000.

Respondent Richard Handelsman ("Handelsman") is a former tenured math professor at the University of Illinois who became an options trader on the Chicago Board of Options Exchange in the mid-1970's. (R. 27: Handelsman Dep. of July 6, 1990, pp. 6-7/JA 435-436). Approximately a year prior to meeting Brian Bartley, Handelsman began investing considerable sums of his own money to study what is known as the "Antrim play," a rich source of natural gas in northern Michigan. He did so in preparation for a limited partnership offering of oil and gas interests located in the Antrim area. (R. 27: Handelsman Dep. of July 6, 1990, pp. 32-35/JA 437-440; R. 79: Oesterle Dep. of March 8, 1991, pp. 39-44/JA 497-502).

Handelsman Venture Group ("HVG"), a named Respondent, was formed in April, 1989 among Handelsman, Michael Oesterle, and Jeffrey Wolfson, several weeks before Handelsman ever met Bartley. (R. 79: Oesterle Dep. of March 8, 1991, pp. 22-23/JA 491-492; R. 82: Jeffrey Wolfson Dep. of April 25, 1991, pp. 10-11, 26-28/JA 557-558, 562-564). It was subject to a specific written agreement drafted by Oesterle and signed by the three joint venturers. (R. 87: Defendants' Motion for Summary Judgment

---

1. All citations herein are to the record before the Court of Appeals for the Sixth Circuit. The term "JA" refers to Joint Appendix.

dated May 31, 1991, Exhibit A/JA 116-120). Of its members, Wolfson has never met Bartley and is certain that he was never in business with him. (R. 82: Jeffrey Wolfson Dep. of April 25, 1991, pp. 10-11, 26-28/JA 557-558, 562-564). Most notably, however, Oesterle himself, the drafter of the joint venture agreement, a member of the joint venture, and friend and ally of Bartley, is clear that Bartley was never a member of Handelsman Venture Group. (R. 79: Oesterle Dep. of March 8, 1991, pp. 22-24/JA 491-493). Handelsman first met Bartley in June, 1988, two months after the formation of HVG. (R. 27: Handelsman Dep. of July 6, 1990, p. 32/ JA 447). Handelsman placed Bartley on his payroll at $2,000 per month plus expenses to act as a consultant who would advise and seek out investment opportunities in gas drillings. (R. 27: Handelsman Dep. of July 6, 1990, pp. 60-61/JA 447-448). Handelsman ceased doing business with Bartley the following year, when he and Bartley could not reach agreement on the terms of their continued relationship. (R. 27: Handelsman Dep. of July 6, 1990, p. 71/JA 449, R. 78: Handelsman Dep. of January 23, 1991, pp. 141-142/JA 466-467).

Petitioner maintains that he reached an oral agreement entitling him to the multi-million dollar interest at a breakfast meeting at Weber's Restaurant in Ann Arbor in June, 1988. (R. 33: Bartley Dep. of August 29, 1990, pp. 115-116/JA 288-289). The conversation at that meeting constitutes the entire foundation of this lawsuit. (R. 33: Bartley Dep. of August 29, 1990, p. 51/JA 273). Despite Bartley's habit of wearing a concealed tape recorder to important meetings (he has produced many hours of secretly taped conversations with Handelsman, none of which are part of the record, and none of which support his claims anyway, *see* JA 305), Bartley has no record whatsoever of the June, 1988 meeting.

Throughout his pleadings and testimony, Bartley has vaguely and in varying and wholly inconsistent terms attempted to describe the interest to which he feels he is entitled as a result of the June,

1988 meeting. (Opinion of the United States Court of Appeals for the Sixth Circuit issued May 27, 1993 at 6). In his complaint, Bartley originally described the carried interest upon which he sued as "ten percent of the gross proceeds" of the various successful prospects he had introduced to HVG. (JA 17). Exhibits "A", "B", "C", "D" attached to Petitioner's Sworn Complaint identified the specific leaseholds in which Petitioner claimed an interest. (JA 20-27).

When Respondents challenged this claim in their first Motion for Summary Judgment under the Michigan Statute of Frauds, arguing that Petitioner was demanding a *real property interest* without a signed writing, Petitioner retreated from this position and argued that in fact he was not claiming a real property interest, but rather a *joint venture interest.* (R. 25: Defendant's Motion for Summary Judgment, dated October 19, 1990/JA 32-68; R. 31: Plaintiff's Response to Defendant's Motion for Summary Judgment/JA 69-86). After oral argument on December 13, 1990, the Honorable Horace W. Gilmore denied Defendants' first Motion for Summary Judgment based upon Petitioner's argument that joint venture agreements need not be formalized by a writing. (R. 31: Plaintiff's Response to Defendant's Motion for Summary Judgment/JA 69-86; R. 49: Order dated January 31, 1991 denying Defendants' first Motion for Summary Judgment/JA 87-89). Based upon this clarification of Petitioner's position, Respondents thereafter conducted extensive discovery on the issue of whether a joint venture could have existed between the Petitioner and themselves. By the time the discovery cutoff date arrived on May 31, 1991, the parties had conducted 1,400 pages of testimony. (*See* Record generally). In addition, some 6,000 documents have been produced by one side or the other. (*See* Record generally).

When deposed, Bartley was unable to clearly define the interest he claims the parties agreed he would receive. The following inconsistent and contradictory excerpts from transcripts

of Bartley's deposition testimony demonstrate his inability to show that the parties ever reached a meeting of the minds or to describe the interest to which he claims he is entitled as a result of the June, 1988 meeting:

> 1. ". . . [We] started talking in terms of a ten percent carried interest with my contributing my earning, a ten percent carried interest as sweat equity and then contributing it to the joint venture for some equivalent ownership in the joint venture or the cash flow of the joint venture and some entity to be formed."

(R. 77: Bartley Dep. of January 22, 1991, Volume IIB, p. 141/JA 352).

> 2. ". . . [W]e didn't have an entity formed yet. We would at some point down the road, but in the meantime we would call ourselves Handelsman Venture Group, or do business under a loosely defined, a joint venture agreement, and the joint venture would be crafted by [Oesterle], an agreement would be crafted by him . . ."

(R. 77: Bartley Dep. of January 22, 1991, Volume IIB, pp. 141-142/ JA 352-353).

> 3. "The nuts and bolts, the agreement that we discussed and agreed to was that I would get ten percent carried interest in any oil or gas or any gas acquisitions that we made through any companies that I introduced them to. . ."

(R. 77: Bartley Dep. of January 22, 1991, Volume IIB, pp. 153-154/ JA 364-365).

Testimony from a later sworn question and answer session provide further evidence that Bartley himself was unsure of the nature of the interest that he claims he is entitled to receive under the contract he alleges:

> Q. I am just trying to understand if a distinction was made at that meeting between your getting a ten percent interest carried interest [sic] in various [drilling] prospects or your getting a ten percent interest in a joint venture.
>
> A. No. I am getting a ten percent interest in various prospects . . . And that ten percent interest in those prospects would be left in the partnership or in the joint venture . . . Let me rephrase that. I was getting a ten percent carried interest in the joint venture. My — *this really wasn't stated because it didn't get addressed . . .*

(R. 77: Bartley Dep. of January 22, 1991, Volume IIB, p. 177/JA 384) (emphasis added).

Although various drafts of proposed agreements were eventually exchanged back and forth (R. 87: Defendants' Motion for Summary Judgment dated May 31, 1991 Exhibits "B" through "E"/JA 121-132), no mutually acceptable writing was ever prepared or executed. (R. 33: Bartley Dep. of August 29, 1990, pp. 127-132/JA 292-297; R. 79: Oesterle Dep. of March 8, 1991, pp. 54-55/JA 512-513).

Shortly after the meeting, Handelsman made a large investment in Trendwell prospects.[2] Trendwell is the only

2. Trendwell Oil is a drilling company in northern Michigan.

company that the parties all agree was discussed at the June, 1988 meeting. Oesterle and Handelsman indicate that the meeting was limited to Trendwell. (R. 79: Oesterle Dep. of March 8, 1991, pp. 36-38, 45-48/JA 494-496, 503-506; R. 27: Handelsman Dep. of July 6, 1990, pp. 48-49/JA 445-446). Bartley helped negotiate the investment and Trendwell Oil gave Bartley a reduced price interest equal to approximately ten percent of the sums invested.[3] (R. 75: Tom Mall Dep. of August 16, 1990, pp. 57-59/JA 479-480; R. 79: Oesterle Dep. of March 8, 1991, pp. 70-71/JA 521-522). Later when Handelsman sought to pool his individual Trendwell interest with Bartley's interest into a limited partnership offering, Bartley refused. (R. 33: Bartley Dep. of August 29, 1990, p. 88/JA 284; R. 77; Bartley Dep. of January 22, 1991, Volume IIB, pp. 218-219; R. 27: Handelsman Dep. of July 6, 1990, p. 142/JA 467). To this day, Bartley continues to receive approximately $8,000 per year from Trendwell Oil. (R. 75: Tom Mall Dep. of August 16, 1990, pp. 59, 72-73/JA 480, 483-484).

Almost a year after the alleged oral joint venture agreement, Dr. Handelsman began investing heavily, as a general partner in various limited partnerships, in another operation known as Ward Lake Drilling. Although Bartley was involved (while on Handelsman's regular pay roll at the part-time rate of $2,000 per month) in introducing Handelsman to Ward Lake prospects, he apparently was never able to negotiate a finder's fee with Ward

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3. In his petition, Bartley points to a handwritten note appearing in one corner of a page in a ledger belonging to Handelsman as summarizing the respective participatory interests in Handelsman Venture Group and showing Bartley to have a 10 percent carried interest therein. As the Court of Appeals noted, that document, while demonstrating that Bartley did receive a percentage interest in Trendwell, does not bring Bartley any closer to showing what interest, if any, Handelsman orally promised him with regard to future prospects. (Appendix A to Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit; Opinion of United States Court of Appeals for the Sixth Circuit issued May 27, 1993 at 7).

Lake of the sort he received from Trendwell. (R. 33: Bartley Dep. of August 29, 1990, p. 25/JA 265). Handelsman eventually entered into an independent lease arrangement with Ward Lake in Iosco County that was entirely unsuccessful. (R. 78: Handelsman Dep. of January 23, 1991, p. 119/JA 465). Bartley claims no entitlement or involvement in that effort. (R. 83: Bartley Dep. of April 29, 1991, pp. 175-177/JA 410-412). The balance of Handelsman's Ward Lake investments appear to be very successful. It is those successful investments, and those investments alone, that Bartley maintains are subject to his ten percent claim.

With discovery complete, Respondents were able to demonstrate that there were material facts, not in dispute which compelled summary judgment in Respondents' favor. (Defendants' Brief in Support of Summary Judgment dated May 31, 1991/JA at 90-165). The legal bases for this contention were twofold:

1. The sum total of all possible evidence on the subject revealed indisputably that the parties fell well short of reaching a legally enforceable agreement of any kind; and,

2. The legal requirements for Petitioner's "alternative" claim of *quantum meruit* could not be met.

The District Court granted the Respondents' Motion for Summary Judgment, holding that Petitioner had not alleged nor testified to the elements essential to the existence of a joint venture. (R. 118: Order Granting Defendants' Motion for Summary Judgment, dated September 5, 1991/JA at 28-29; R. 126/131: Transcript of Proceedings of August 8, 1991 Hearing on Defendants' Motion for Summary Judgment/JA at 232-234).

When that Motion was granted, Petitioner made a Motion for

Reconsideration in which he retreated from the position that his claims were based upon a joint venture and re-asserted his former position that his claim was based upon a "carried interest" in real property (R. 119: Plaintiff's Motion for Reconsideration dated September 9, 1991/JA 195-213), that Motion being denied by Order of October 2, 1991 (R. 124/JA 214). On October 21, 1991, Notice of Appeal was filed by the Petitioner seeking reversal of the District Court's Order Granting Defendants' Motion for Summary Judgment. (R. 133/JA 30-31).

The Court of Appeals for the Sixth Circuit affirmed the District Court's grant of Respondents' Motion for Summary Judgment on the alternative ground that by his failure to adequately define or explain the interest he claims in his suit, Bartley was unable to show that there was a meeting of the minds as to that essential term of the alleged contract. (Opinion of the United States Court of Appeals for the Sixth Circuit filed April 19, 1993 at 7-8). Thereafter, Bartley filed a Petition for Rehearing on April 29, 1993 which the Court of Appeals for the Sixth Circuit denied on May 19, 1993. Petitioner now seeks this Court's review of the judgment of the Court of Appeals.

REASONS FOR DENYING THE WRIT

I.

THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S PRIOR DECISIONS CONCERNING APPLICATION OF THE LAW OF SUMMARY JUDGMENT.

Although Petitioner asserts that this Court should review the decision of the Court of Appeals because it conflicts with decisions of this Court concerning application of the law of summary judgment, he completely fails to demonstrate that any conflict

exists. In fact, Petitioner fails to cite even one decision of the Supreme Court with which the decision below conflicts. Perhaps the best explanation for Petitioner's inability to demostrate the existence of such a conflict is that the Court of Appeals' application of the law of summary judgment comports with the standards set forth by this Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Electric Industrial Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

The Court of Appeals found that Bartley's inability to define accurately the legal interest which he claims precludes him from demonstrating that there was a meeting of the minds on this essential element of the contract which he claims. The language of Rule 56(c) of the Federal Rules of Civil Procedure mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case. *Celotex*, 477 U.S. at 322. This Court further held in *Celotex*:

> In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Id. at 322-323.

While Petitioner is correct when he states that the Supreme Court looks at the record on summary judgment in a light most

favorable on the party opposing the motion, *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962), this does not in any way conflict with the decision below; for if the evidence that the non-moving party presents is merely colorable or is not significantly probative, summary judgment may be granted. *Anderson v. Liberty Lobby*, 477 U.S. 242, 249-250 (citing *Dombrowski v. Eastland*, 387 U.S. 82 (1967); *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290 (1968)).

II.

THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS CONCERNING APPLICATION OF THE LAW OF SUMMARY JUDGMENT.

In its allegation that the Court of Appeals' application of summary judgment conflicts with the decisions of other circuits, Petitioner cites various cases which pre-date this Court's own decisions on the proper standard for summary judgment. Petitioner states that "it was incumbent upon Respondents' [sic] as moving party to convince the Court that no facts exist herein which establish formation of the oral agreement alleged by Bartley." Petition at 52 (citing *Gertner v. Hospital Affiliates International, Inc.*, 602 F.2d 685, 689 (5th Cir. 1979). Since Respondents had relied only on Petitioner's own voluminous testimony to demonstrate the absence of any enforceable promise, even this pre-*Matsushita* test was clearly met in the instant case.

More importantly, however, this Court in *Matsushita* has rearticulated the standard for summary judgment post-*Gertner*. In *Matsushita*, this Court held that in order to survive a motion for summary judgment, "the non-moving party must come forward with 'specific facts showing there is a *genuine issue for trial*.' " *Matsushita Electric Industrial Co. Ltd. v. Zenith Radio Corp.*, 475

U.S. 574, 587 (emphasis in original). While the moving party must direct the court's attention to the absence of evidence supporting the non-moving party's case, it then becomes the non-moving party's responsibility to "go beyond the pleadings" to show there is a genuine issue for trial if he is not to lose the motion. *Burk v. Beene*, 948 F.2d 489 (8th Cir. 1991) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). In the case at bar, the Petitioner never came forward with evidence tending to demonstrate that there was a genuine issue for trial.

Petitioner fails to cite even one case dating after this Court's pronouncement of the current summary judgment standard as set forth in *Celotex, Matsushita* and *Anderson* to demonstrate a conflict between the decision below and other applicable decisions of other circuit courts. Since this Court's issuance of this trilogy of cases concerning the application of summary judgment, every circuit has followed and adopted the standard as set forth by this Court, including the Court of Appeals in the case below.[4] No conflict exists among the circuit courts as to the correct standard of summary judgment, nor does the Court of Appeals for the Sixth Circuit's decison conflict with applicable decisions of other United States Courts of Appeals.

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4. *Bias v. Advantage International, Inc.*, 905 F.2d 1558 (D.C. Cir. 1990); *United States v. O'Connell*, 890 F.2d 563 (1st Cir. 1989); *Carey v. Crescenzi*, 923 F.2d 18 (2nd Cir. 1991); *United States v. One 107.9 Acre Parcel of Land Located in Warren Township, Bradford County, Penna.*, 898 F.2d 396 (3rd Cir. 1990); *M&M Medical Supplies and Service, Incorporated v. Pleasant Valley Hospital, Incorporated*, 981 F.2d 160 (4th Cir. 1992); *Park Club, Inc. v. Resolution Trust Corp.*, 967 F.2d 1053 (5th Cir. 1992); *Harris v. Murphy Oil, U.S.A., Inc.*, 980 F.2d 991 (5th Cir. 1992); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472 (6th Cir. 1989); *A.V. Consultants, Incorporated v. Barnes*, 978 F.2d 996 (7th Cir. 1992); *Burk v. Beene*, 948 F.2d 489 (8th Cir. 1991); *City of Vernon v. Southern California Edison Company*, 955 F.2d 1361 (9th Cir. 1992); *Clemmons v. Bohannon*, 956 F.2d 1523 (10th Cir. 1992); *Tipton v. Bergrohr GMBH-Siegen*, 965 F.2d 994 (11th Cir. 1992).

III.

THE COURT OF APPEALS' AFFIRMANCE OF THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT PRESENTS NEITHER A FEDERAL NOR CONSTITUTIONAL QUESTION.

This case does not involve any federal or constitutional issues which would warrant this Court's review. This entire exercise is an attempt by Petitioner to have the United States Supreme Court make a ruling on the meaning of Michigan oil and gas joint venture law.[5]

The only questions Bartley raises in his Petition turn on the particular facts of this case alone and are of interest only to the parties to it. In essence, Petitioner asks this Court to make a third review of the lengthy trial court record to see if it can find what two previous courts have been unable to find — proof that the parties ever reached a meeting of the minds or even could have reached a meeting of the minds when Bartley himself was unable to define the interest which he claims. This Court has ruled that such fact canvassing is not a task to be served by a grant of certiorari: "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925).

In the present case, Petitioner raises only questions which turn entirely on the facts of this case, already resolved twice in favor of Respondents, and without any impact outside of the limits of this case. Under these circumstances, a review by this Court is not warranted: "This Court being a court of law rather than a court for correction of errors in fact finding, cannot undertake to review

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5. Petitioner acknowledges that "[t]he law pertaining to joint ventures seems to vary in substantial degree from state to state." (Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit at 42).

concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co., Inc. et al. v. Linde Air Products*, 336 U.S. 271 (1949).

IV.

THE COURT OF APPEALS' AFFIRMANCE OF THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT WAS CORRECT AND DOES NOT WARRANT REVIEW BY THIS COURT.

The Court of Appeals' affirmance of the District Court's order granting Plaintiff's motion for summary judgment was correct. Contrary to Petitioner's allegations, an appellate court can find an alternative basis for concluding that a party is entitled to summary judgment on any ground that finds support in the record and ignore any erroneous basis relied upon by the district court. *Hansard v. Barret*, 980 F.2d 1059, 1061 (6th Cir. 1992); *Box v. A & P Tea Co.*, 772 F.2d 1372 (7th Cir. 1985).

The Court of Appeals for the Sixth Circuit affirmed the District Court's grant of summary judgment on the grounds that Bartley's inability to adequately define or explain the interest he claims in his suit precludes any rational trier of fact from finding that the parties had reached a meeting of the minds as to this essential element of the alleged oral contract under which Bartley claims he is entitled to recover.

Bartley has had adequate opportunity to brief and argue this issue. In both Defendants' Brief in Support of Motion for Summary Judgment, dated May 30, 1991, and in their Brief on Appeal, Respondents allege that the parties had not reached a "meeting of the minds" on essential contractual terms including the interest to which Bartley claims he is entitled. In their argument that essential terms of the contract were not even discussed let

alone agreed upon, Respondents state:

> Could Bartley be claiming ten percent of the entire limited partnership investments, or ten percent of just what Handelsman has invested in cash, or ten percent of some other number regarding these limited partnerships.

(R. 87: Brief in Support of Motion for Summary Judgment, dated May 30, 1991 at 15/JA 110; Brief on Appeal of Defendants-Appellees, dated March 11, 1992 at 23). In addition, the contradictory testimony which Bartley had given in deposition and which had been entered in the trial court record regarding the interest he claims he was to receive under the alleged contract[6] was brought to the attention of Bartley and both the District Court and Court of Appeals in Respondents' briefs to the respective courts. (R. 87: Brief in Support of Motion for Summary Judgment, dated May 30, 1991 at 9-14/JA 104-109; Brief on Appeal of Defendants-Appellees, dated March 11, 1992 at 14-16). Therefore, the Court of Appeals acted completely within its authority in affirming the District Court's grant of summary judgment on an alternative basis that had been raised before the trial court.

The Court of Appeals found that Bartley failed to define accurately the legal interest which he claims was promised him by Respondents and failed to put forth sufficient evidence to support a verdict that he was entitled to any specific interest in future prospects developed by the alleged joint venture. The Court of Appeals further held that through this failure, Bartley demonstrated that there could not be and was not a meeting of the minds of the parties on this essential element of the contract which he claims:

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6. *See* Counter Statement of the Case at 3-5.

> If Bartley himself does not know what his interest was to be, he can hardly be heard to claim that there was a meeting of the minds of the parties as to what his interest was to be. Thus, what Bartley has shown is that there was no meeting of the minds as to that essential element of the contract.

(Opinion of United States Court of Appeals for the Sixth Circuit issued May 27, 1993 at 10-11). Where a plaintiff attempting to get past a motion for summary judgment has "fail[ed] to make a showing sufficient to establish the existence of an element essential to [his] case," the case cannot be allowed to proceed. *Celotex*, 477 U.S. at 323; *Collins v. Nagle*, 892 F.2d 489, 493 (6th Cir. 1989).

In the instant petition, there has been no showing that the Court of Appeals ruled erroneously. In fact, based on the record before it, the Court of Appeals was entirely correct in affirming the District Court's grant of summary judgment in Respondents' favor as to counts I and II of the Petitioner's complaint.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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